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NOT TO BE PUBLISHED

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. DALE WILLIAM LOCHMILLER, Defendant and Appellant.	E025541 (Super.Ct.Nos. CR 47034 RIF-76007) O P I N I O N

APPEAL from the Superior Court of Riverside County. Ronald Heumann, Ronald L. Taylor, and Patrick F. Magers, Judges. Affirmed in part, reversed in part, and affirmed as modified in part with directions.

Rudy Kraft, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Peter Quon, Jr., Supervising Deputy Attorney General, and Lilia E. Garcia, Deputy Attorney General, for Plaintiff and Respondent.

A criminal defendant appeals from a judgment convicting him of a variety of offenses. We find that two of the convictions are not supported by the evidence and that the sentence on a third should have been stayed. Otherwise, we affirm.

PROCEDURAL BACKGROUND

A. CASE NO. CR-47034

In 1993, a four-count indictment was filed against Dale Lochmiller ("defendant"), Shannon Jean Lochmiller ("Shannon"), Riccardo Baker, and Raymond Mendoza. Count I charged them with attempting to kidnap William Mitchell for purposes of ransom or extortion. (Pen. Code, §§ 664 & 209, subd. (a).[1]) Count III charged them with conspiracy to kidnap for extortion. (§§ 182 & 209, subd. (a).) Count IV charged them with conspiring with a prisoner to escape from jail. (§§ 182 & 4532.) Count II, which was alleged solely against the defendant, charged him with attempted escape. (§§ 664 & 4532.)

After a jury trial, the defendant was found guilty: of solicitation to commit kidnap for purposes of extortion (§ 653f, subd. (a)) as a lesser offense related to the attempted kidnap charged in count I; of attempted escape as charged in count II; and of conspiracy to escape as charged in count IV. The jury was unable to reach a verdict on the conspiracy to kidnap charged in count III, as to which the court declared a mistrial. Count III was later dismissed pursuant to section 1385.

[1] Unless specified otherwise, all further section references are to the Penal Code.

He was sentenced to the upper term of three years on the solicitation of kidnapping, plus two consecutive eight-month terms for the attempted escape and conspiracy to escape, for a total of four years and four months.

B. CASE NO. RIF-76007

In a two-count indictment returned in July of 1997, the defendant was charged with escaping or attempting to escape from jail (§ 4532, subd. (b)) on June 28, 1997, and July 21, 1997, respectively. After trial, the jury could not reach a verdict regarding Count I, with the result that a mistrial was declared and that count was subsequently dismissed on the People's motion pursuant to section 1385. On Count II, the jury found the defendant guilty of damaging jail property (§ 4600), a misdemeanor, as a lesser offense related to that charged. The defendant was sentenced to 90 days, to be served concurrently with the sentence imposed in case CR-47034.

CONTENTIONS

Regarding case no. CR-47034, the defendant contends: that the delay between the offense and the indictment deprived him of due process; that the trial court erred by denying his motion for judicial immunity for Shannon and Baker; that the trial court erred by admitting evidence of his own request for immunity; that his trial attorney failed to render effective assistance of counsel; that the conviction for attempted escape is not supported by substantial evidence; and that the trial court improperly punished him twice for the same course of conduct. We find merit only in the last two contentions.

Regarding case No. RIF-76007, the defendant contends that the conviction of damaging jail property is not supported by the evidence. That contention is also correct.

The defendant also asks us to address several issues regarding the two counts that were dismissed after the respective juries failed to reach a verdict. Because those issues will not arise unless the People decide to refile those charges, we do not consider them.

ANALYSIS

A. THE DELAY IN SEEKING THE INDICTMENT DID NOT DEPRIVE THE DEFENDANT OF DUE PROCESS.

The right to a speedy trial is guaranteed by both the federal and state constitutions. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) Under both California and federal law, the right to a speedy trial attaches upon the arrest of a felony suspect or the filing either of an information by the district attorney or of an indictment returned by a grand jury, whichever first occurs. (*Scherling v. Superior Court* (1978) 22 Cal.3d 493, 504.) The right under the California Constitution also attaches when a misdemeanor complaint is filed, even though the defendant has not yet been arrested. (*Ibid*.)

When the delay at issue occurs between the commission of the crime and the time either that the defendant is arrested or an accusatory pleading is filed, the constitutional issue is not the right to a speedy trial, but rather the right to due process. (*Scherling v. Superior Court, supra*, 22 Cal.3d at p. 505.) "But regardless of whether defendant's claim is based on a due process analysis or a right to a speedy trial not defined by statute, the test is the same, i.e., any prejudice to the defendant resulting from the delay must be weighed against justification for the delay." (*Ibid*., fn. omitted.) The ultimate issue is whether the defendant was deprived of a fair trial. (*Id.* at p. 507.)

1. The Trial Court's Finding of Prejudice Is Supported by Substantial Evidence.

Because pre-indictment delay is not presumed to be prejudicial (*Scherling v. Superior Court, supra,* 22 Cal.3d at p. 504, fn. 8), mere delay is not enough to establish a constitutional violation. To establish a violation of due process, the defendant has the initial burden to demonstrate, not just delay, but actual prejudice attributable to that delay. (*Serna v. Superior Court* (1985) 40 Cal.3d 239, 249.)

Although the crimes charged were alleged to have been committed between June 1, 1991, and July 31, 1991, the indictment was not filed until January 13, 1993, over 17 months later. The defendant moved for an order dismissing the charges on the grounds that the delay between the time of the offenses and the filing of the charges had deprived him of due process. He argued that the delay was prejudicial to him because his mother, Helen Lochmiller ("Helen"), had died in December of 1992. Noting that Helen was an alleged conspirator who was accused of having met with and paid others involved in the plan, the defendant argued that he was prejudiced by his inability after her death to present testimony from her that would contradict evidence that any conspiracy existed.

Although the People conceded that the absence of Helen was "somewhat prejudicial" to the defense, they argued that any prejudice was minimal because there was abundant evidence to impeach any exculpatory testimony Helen might have offered and because Helen had no recollection of the relevant events when she was interviewed.

The trial court found that the defendant had been prejudiced by the delay of prosecution until after Helen's death. "Prejudice is a factual question to be determined by

the trial court." (*People v. Hill* (1984) 37 Cal.3d 491, 499.) The trial court's resolution of that question will not be disturbed on appeal if it is supported by substantial evidence. (*Ibid*.; *People v. Martinez* (1995) 37 Cal.App.4th 1589, 1593.) Even without the People's concession, the absence of Helen is prejudicial.

The most important type of prejudice is something that impairs the defendant's ability to present a defense. (*Barker v. Wingo* (1972) 407 U.S. 514, 532 [33 L.Ed.2d 101, 118].) "Prejudice . . . may be shown by the loss of a material witness or other missing evidence or fading memory caused by lapse of time." (*People v. Archerd* (1970) 3 Cal.3d 615, 640.) "If witnesses die or disappear during a delay, the prejudice is obvious." (*Barker* at p. 532.)

2. The Trial Court Did Not Err by Concluding that the Prejudice to the Defendant Did Not Outweigh the Justification for the Delay.

Once a showing of actual prejudice has been made, the burden shifts to the People to justify the delay by showing that it resulted from a valid law enforcement purpose. (*People v. Archerd, supra,* 3 Cal.3d at p. 639; *People v. Pellegrino* (1978) 86 Cal.App.3d 776, 779.) The trial court must then weigh the severity of the prejudice to the defendant against any justification for the delay. (*People v. Hill, supra*, 37 Cal.3d at p. 496; *Jones v. Superior Court* (1970) 3 Cal.3d 734, 740.) "Even a minimal showing of prejudice may require dismissal if the proffered justification for delay be unsubstantial." (*Ibarra v. Municipal Court* (1984) 162 Cal.App.3d 853, 858.) Conversely, the more reasonable the delay, the more prejudice the defense must show to establish a deprivation of due process. (*Ibid*.)

Four basic factors are considered when determining whether the delay was reasonably justified: "the length of the delay, the reason for the delay, the defendant's assertion of his right to be brought to trial, and prejudice caused by the delay." (*People v. Hill, supra*, 37 Cal.3d at p. 496; accord, *People v. Archerd, supra*, 3 Cal.3d at p. 640.) Of these, the most important is the degree of prejudice suffered by the defendant. (*Hill* at p. 496.)

The People concede that they began to investigate a possible conspiracy on May 31, 1991. As justification for not having an indictment returned until January 13, 1993, the People argued that the delay resulted from the hundreds of hours of investigation necessary to assemble evidence sufficient to prove the existence of the conspiracy and from the need to identify all the conspirators and thereby ensure the safety of the intended victim. They also presented evidence that the defendant was transported to San Joaquin County in July of 1991 to be tried on other charges, of which he was convicted in May of 1992. Thereafter, he was imprisoned at Pelican Bay. The decision to seek indictments was made in the middle of 1992. The deputy district attorney assigned responsibility for the case worked diligently but had numerous other murder cases to attend to at the same time. Evidence was finally presented to the grand jury on January 11 and 12, 1993.

The trial court found that the People had not delayed out of a desire to take advantage of Helen's age or illness or otherwise to disadvantage the defense. The trial court also found that, although the delay was unusually long, and although the People should have decided by the end of May 1992 to seek an indictment of the defendant, "the earliest that this matter really could have been brought in some kind of a reasonable time frame to the

grand jury would have been sometime in the Summer or early Fall of 1992," i.e., in August or September of 1992. The subsequent delay occurred both (1) because the prosecutors felt that they could take their time because the defendant was in prison and the other conspirators had all been identified and (2) because the prosecutor assigned had lots of evidence to evaluate and little spare time in which to do it.

After weighing the severity of the prejudice against the strength of the justification, the trial court concluded that the justification for the delay outweighed the prejudicial effect of the delay. It reasoned that the degree of prejudice to the defendant was slight, and that Helen's absence would also prejudice the prosecution. Although the justification for the delay after the summer of 1992 was not as strong as that for the delay before then, it was sufficient to overcome the slight possible prejudice to the defendant.

The defendant attacks the trial court's analysis, arguing that the delay after the summer of 1992 should be deemed to be entirely unjustified and thus incapable of outweighing even slight prejudice. But the trial court did not find the final period of delay to be unjustified. To the contrary, it accepted the People's evidence and argument that the delay was justified: "I don't contest that there's a legitimacy in their delays, but I think that the delays were probably somewhat excessive . . . ." Thus, the delays were justified, but the strength of the justification is weakened to the extent that the matter could have been presented to the grand jury earlier.

The standard by which we review the trial court's determination that the prejudicial delay was justified is not clear. Several cases, without distinguishing between the trial court's finding of prejudicial delay and its conclusion as to whether the severity of the

prejudice outweighs the strength of the justification, suggest that both the finding and the conclusion are decisions of fact that are reviewed for substantial evidence. (*People v. Mitchell* (1972) 8 Cal.3d 164, 167; *People v. Dunn-Gonzalez* (1996) 47 Cal.App.4th 899, 911-912; *People v. Wright* (1969) 2 Cal.App.3d 732, 736.) Relying on those authorities, the People contend that the trial court's decision here—i.e., that the justification for the delay outweighed the prejudice the delay caused to the defendant—must be affirmed because it is supported by substantial evidence.

They are mistaken. The substantial-evidence test is used to review a trial court's resolution (1) of questions of fact and (2) of mixed questions of law and fact that are predominantly factual. (*People v. Mickey* (1991) 54 Cal.3d 612, 649; *People v. Jackson* (1992) 10 Cal.App.4th 13, 20.) Factual questions are those concerning historical events or physical conditions and the credibility of their narrators. (*People v. Louis* (1986) 42 Cal.3d 969, 985; *Jackson* at pp. 19-20.) Therefore, the issue of whether the defendant suffered any adverse consequences from the delay is a question of fact. So is the issue of what caused the delay. The trial court's resolution of those factual issues is appropriately reviewed for substantial evidence. By contrast, the ultimate step—weighing the prejudice against the justification for the delay—does not involve a determination of historical fact. Therefore, the substantial-evidence test is not the appropriate standard by which to review that ultimate decision.

There is authority for reviewing the trial court's determination for an abuse of discretion. (*People v. Cave* (1978) 81 Cal.App.3d 957, 963; and see *People v. Martinez,*

supra, 37 Cal.App.4th at p. 1597.) But the correct rule appears to be that we review it independently.

The trial court's weighing of prejudice versus justification is a mixed question of law and fact, i.e., a question of "'whether the rule of law as applied to the established facts is or is not violated.'" (*People v. Louis, supra,* 42 Cal.3d at p. 984, quoting *Pullman-Standard v. Swint* (1982) 456 U.S. 273, 289, fn. 19 [102 S.Ct. 1781].) If, as noted above, a mixed question remains essentially factual, it is reviewed for substantial evidence. (*Louis* at p. 987.) If, on the other hand, the question requires a court "'to exercise judgment about the values that animate legal principles, then the concerns of judicial administration will favor the appellate court, and the question should be classified as one of law and reviewed de novo.'" (*Ibid*., quoting *United States v. McConney* (9th Cir. 1984) 728 F.2d 1195, 1202.) The policy "'favoring de novo review is even more striking when the mixed question implicates constitutional rights.'" (*Louis* at p. 987, quoting *McConney* at p. 1203.) Accordingly, our Supreme Court's usual practice is to independently review mixed questions affecting constitutional rights. (*People v. Cromer* (2001) 24 Cal.4th 889, 901 [rejecting abuse-of-discretion review of due-diligence determination regarding prosecution's failure to locate a witness].)

The resolution of the balance between prejudice and justification is a matter of constitutional law that "'requires us to consider abstract legal doctrines, to weigh underlying policy considerations, and to balance competing legal interests.'" (*People v. Louis, supra,* 42 Cal.3d at p. 988, quoting *United States v. McConney, supra,* 728 F.2d at p. 1205, fns. omitted.) It "'is a question that no amount of factfinding will answer.'"

(*Louis* at p. 988, quoting *McConney* at p. 1205.) It should be subject to de novo review on appeal.

After exercising our independent review, we agree with the trial court that the prejudicial delay was justified. As the trial court found, the potential for prejudice was slight. Had Helen not died prior to the indictment being returned, she presumably would have been indicted along with the other alleged conspirators. As a defendant herself, she would have been likely to assert her rights to silence under the Fifth Amendment rather than testify. And even if she had testified and had offered testimony favorable to the defendant, there were many other items of potential evidence with which she could have been impeached. Although the People did not prosecute the matter as diligently as they should have, the slight potential for prejudice resulting from Helen's death did not deprive the defendant of a fair trial.

B. THERE IS NO INHERENT POWER OF JUDICIAL IMMUNITY.

The defendant moved the trial court to grant judicial immunity to Shannon and Baker, who had asserted their Fifth Amendment right not to testify. The trial court denied that motion. The defendant contends that the trial court erred. He is mistaken.

Statutorily authorized immunity in felony cases is governed by section 1324, which places the power to request immunity in the hands of the prosecutor. Because immunity is an integral part of the charging process, it is a prosecutorial rather than a judicial decision. (*In re Weber* (1974) 11 Cal.3d 703, 720; *People v. DeFreitas* (1983) 140 Cal.App.3d 835, 840.) Accordingly, "the Courts of Appeal of this state have uniformly rejected the notion that a trial court has the inherent power . . . to confer use immunity upon a witness called by

the defense." (*People v. Hunter* (1989) 49 Cal.3d 957, 973; see, e.g., *DeFreitas* at pp. 840-841.) "With few exceptions, federal and state judicial authority across the nation is to the same effect." (*Hunter* at p. 973; accord, *In re Williams* (1994) 7 Cal.4th 572, 610.) In short, "there is no authority in this state for the proposition that . . . the trial court must grant immunity to a witness on the ground that the witness's testimony could be favorable to the defense." (*People v. Cudjo* (1993) 6 Cal.4th 585, 619.)

Although the Supreme Court has opined in dicta that "it is possible to hypothesize cases where a judicially conferred use immunity might possibly be necessary to vindicate a criminal defendant's rights to compulsory process and a fair trial" (*People v. Hunter, supra,* 49 Cal.3d at p. 974), it has never encountered a set of circumstances justifying the existence or exercise of such a power (*id*. at pp. 974-975; *People v. Lucas* (1995) 12 Cal.4th 415, 460-461; *In re Williams, supra,* 7 Cal.4th at p. 610; *People v. Cudjo, supra,* 6 Cal.4th at p. 619). Moreover, it most recently characterized as "doubtful" the "proposition that the trial court has inherent authority to grant immunity." (*Lucas* at p. 460.)

We decline to recognize the existence of a judicial immunity power for which our Supreme Court has said "there is no authority in this state . . . ." (*People v. Cudjo, supra,* 6 Cal.4th at p. 619.) Instead, we follow the Courts of Appeal in this state and the weight of authority across the country by rejecting an inherent power to confer immunity. "The mischief that such a rule would cause is incalculable." (*People v. Estrada* (1986) 176 Cal.App.3d 410, 418.)

C. THE TRIAL COURT DID NOT ERR BY OVERRULING THE DEFENDANT'S OBJECTIONS TO THE ADMISSION OF EVIDENCE OF HIS REQUEST FOR IMMUNITY.

The defendant contends that the trial court erred by overruling his objection to the admission of certain portions of an audiotape recording of an interview during which the defendant asked for immunity for himself. He is mistaken.

In September of 1991, the defendant was interviewed at Pelican Bay State Prison by two district attorney investigators. After securing a waiver from the defendant of his right to remain silent, the investigators informed him that they were continuing to investigate the conspiracy to kidnap Mitchell. The defendant discussed letters from and telephone conversations with Shannon. He then accused Ray Smith and Shannon of planning to kidnap Mitchell.

Before exploring Smith's alleged involvement, the investigators asked the defendant whether he would undergo a polygraph examination concerning his own involvement in the conspiracy. The defendant answered, "Well, . . . if you want to know all the facts then I want something in return myself." Specifically, the defendant demanded that, "if I'm going to divulge everything I know to you[,] [t]hen I would like to get immunity for myself or my mother and I would like for someone . . . to arrange a polygraph test for myself" concerning his prior conviction for the attempted murder of Larry Rossen. When the investigators told him that they were not authorized to offer immunity, he refused their request that he take a polygraph examination concerning the kidnapping conspiracy.

At trial, the defendant objected to the introduction of substantially any part of the exchange, from the investigator's request to the defendant's counteroffer and ultimate refusal. Similarly, he objected to subsequent references to his request for immunity. He argued that it was all part of a single course of negotiation concerning the requested polygraph and as such was barred by Evidence Code section 351.1. Alternatively, he contended that the references to immunity were out-of-context, misleading and more prejudicial than probative, and thus were barred by Evidence Code section 352.

The prosecutor stipulated to excluding the direct references to polygraphs and the trial court agreed that some other portions of the exchange should be excluded because they were "part and parcel of the discussions about the lie detector." But the trial court refused to exclude the defendant's demand for immunity as a condition of agreeing to a polygraph examination. The redacted tape was played for the jury.

On appeal, the defendant renews his contentions that, under Evidence Code sections 351.1 and 352, the trial court erred by admitting evidence of the defendant's demand for immunity.

Any reference to either an offer or a refusal to take a polygraph examination is inadmissible unless all parties agree. (Evid. Code, § 351.1, subd. (a).) Here, the court did not admit any such reference. Instead, the court admitted a statement made in response to the investigators' reference to a polygraph examination.

The defendant argues that, because his request for immunity was made in the context of a counteroffer to a request that he take a polygraph examination, it is implicitly encompassed within the statutory exclusion. He is mistaken. Evidence Code section 351.1

bars the admission of evidence of polygraph examinations because of concerns that juries will assign too much credence to the results of those examinations. (*People v. Kegler* (1987) 197 Cal.App.3d 72, 89.) The prohibition of references to polygraphs prevents the jury from speculating as to the results of such an examination. But admitting evidence made in response to requests that a defendant or other witness submit to a polygraph examination does not tend either to distract the jury or to promote speculation. Therefore, the trial court's ruling does not undermine the policies underlying section 351.1.

The defendant's argument that the trial court erred by overruling his objection on the basis of Evidence Code section 352 also fails. The relevance of the defendant's request for immunity is that it may be interpreted as an admission of guilt. While the strength of that inference might have been somewhat reduced had the jury been informed of the context in which the defendant had sought immunity, the trial court determined that the probative value of that inference was not outweighed by the prejudice caused by the misleadingly redacted recording. That determination is not arbitrary or patently unreasonable. Therefore, we cannot say that the trial court abused its discretion under section 352. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

D. THE DEFENDANT HAS FAILED TO DEMONSTRATE INEFFECTIVE ASSISTANCE OF COUNSEL.

The defendant next contends that, by failing to object to the introduction of his request for immunity on the basis of the prohibition against the admission of evidence of plea negotiations, his defense counsel deprived him of his right to the effective assistance of counsel. He is mistaken.

Evidence of a plea of guilty that was subsequently withdrawn or of an unaccepted offer to plead guilty to either the charged crime or some other offense is generally inadmissible. (§ 1192.4; Evid. Code, § 1153.) We have extended that rule to "admissions made in the course of bona fide plea bargaining negotiations." (*People v. Tanner* (1975) 45 Cal.App.3d 345, 351-352.) "Bona fide plea negotiations include statements made to the trial court and to the prosecuting attorney because those are the participants in a plea bargain." (*People v. Magana* (1993) 17 Cal.App.4th 1371, 1377.) "Moreover, the rule of inadmissibility applies, not merely to admissions of guilt, but also to 'any incidental statements made in the course of plea negotiations . . . .'" (*People v. Crow* (1994) 28 Cal.App.4th 440, 450, quoting *Tanner* at p. 350.)

The defendant concedes that those holdings do not strictly apply to this situation because "a request for immunity is somewhat different from plea negotiations" and because his "request, made to an investigator from the district attorney's office, is somewhat different from plea negotiations with a prosecuting attorney or the trial court." Nevertheless, he argues that the distinctions are insignificant and that the same policy considerations lead to the same result.

The analogy between a request for immunity and plea negotiations is questionable. The prosecution did not ask the defendant to plead to anything and he did not offer to do so. Instead, to the extent that the defendant was asking for transactional immunity, he was essentially asking for an agreement that he would never be charged at all in connection with the alleged conspiracy. The public policy favoring the settlement of cases does not appear

to carry the same weight when no case has been filed and no responsibility for criminal wrongdoing is being taken.

However, we need not decide that issue. Were we to extend the rule against the introduction of evidence of admissions or other statements made during plea negotiations to admissions or other statements made in the context of a request for or negotiations concerning immunity, we would be creating a new rule of law. Defense counsel would not have been ineffective for failing to anticipate and object on the basis of a then non-existent rule of law. Therefore, the defendant's contention that his trial counsel rendered ineffective assistance fails.

E. THE CONVICTION OF ATTEMPTED ESCAPE IN CASE NO. CR-47034 IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The jury convicted the defendant of both conspiring to escape and attempting to escape. The defendant contends that the conviction on the attempt charge is not supported by substantial evidence because there is no evidence that the conspirators ever moved beyond planning and preparation. He is correct.

"An attempt to commit a crime requires a specific intent to commit the crime and a direct but ineffectual act done toward its commission. [Citation.] The act must go beyond mere preparation, and it must show that the perpetrator is putting his or her plan into action, but the act need not be the last proximate or ultimate step toward commission of the substantive crime." (*People v. Kipp* (1998) 18 Cal.4th 349, 376.)

The People rely on evidence that the defendant prepared written escape plans and that he wrote letters and talked to Shannon about the recruitment of people to help carry out

his escape plans. But planning the offense and arranging the means for its commission are merely aspects of preparation. (*People v. Dillon* (1983) 34 Cal.3d 441, 452-453.) Preparation does not constitute an attempt. (*People v. Kipp*, *supra*, 18 Cal.4th at p. 376; *Dillon* at pp. 452-453.) Moreover, during closing argument, the prosecutor specifically told the jury that she was not relying upon any acts by the defendant to prove the attempt. "[I]n our case, what we're talking about here is not the defendant's own actions but his actions through other people."

The People also rely on evidence that Shannon and Mendoza parked in a car near the district attorney's office in downtown Riverside and talked to an investigator from that office. The People argue that the jury could have reasonably concluded that their presence was an act in furtherance of the escape. But they do not explain the purpose and import of that act, or how that act furthered the planned escape. Because that vague act does not "'clearly indicate a certain, unambiguous intent to commit'" an escape, it does not constitute an attempt. (*People v. Dillon*, *supra*, 34 Cal.3d at p. 452, quoting CALJIC No. 6.00.)

Because there is no evidence of a direct act done toward the commission of the crime of escape other than acts of preparation, the defendant's conviction of attempted escape must be reversed.

F. PENAL CODE SECTION 654 BARS PUNISHMENT FOR BOTH THE SOLICITATION OF A KIDNAPPING AND THE CONSPIRACY TO ESCAPE BY MEANS OF THAT KIDNAPPING.

As noted above, the defendant was convicted and separately sentenced for soliciting a kidnap, attempting to escape, and conspiring to escape. The defendant contends that all three offenses are part of an indivisible course of conduct committed to achieve a single objective for which multiple punishment is barred by section 654. Having already decided that the conviction for an attempted escape must be reversed, the question remaining is whether the defendant can be punished for both soliciting the kidnap and conspiring to escape. He cannot.

As the indictment charged and as the jury found, the defendant had conspired with others to effect his escape by kidnapping Mitchell and using that captive to bargain for the defendant's release. The solicitation of others to kidnap Mitchell was in furtherance of that conspiracy and was designed to achieve the same objective.

The People's argument that the conspiracies had two separate objectives—one to kidnap Mitchell and one to break the defendant out of custody by force—is not only unsupported by any citation to the record of evidence received at trial, but is contrary to the facts as alleged in the indictment and found true by the jury. Indeed, that the proposed kidnapping was designed to further the escape was the very theory of the prosecution. When pleading the conspiracies to kidnap (count III) and to escape (count IV), the indictment alleged that the identical 13 overt acts furthered both conspiracies.

The sentence imposed on the conspiracy alleged in count IV must be stayed.

G. THE CONVICTION FOR DAMAGING JAIL PROPERTY IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

"Every person who willfully and intentionally . . . destroys or injures . . . any public property in any jail or prison" is guilty of a misdemeanor if the damage does not exceed $400. (§ 4600, subd. (a).) The defendant contends that his conviction of that offense is not supported by substantial evidence. He is correct.

The People rely solely on evidence that, when examining a panel of sheet metal above the shower in the defendant's cell, officers discovered that one screw was missing and that two other screws were loose enough to be removed without the aid of a tool. Even assuming that the defendant removed the missing screw and loosened the two others (a fact for which there is no direct and only slight circumstantial evidence), there is no significant damage to jail property.

That a screw is in place but not as tight as it could be does not constitute damage. Although the removal of a single screw might be considered to be damage to the jail facility in a technical sense, that damage is too de minimis to establish criminal liability or to justify criminal punishment. Absent a showing that the missing screw either could not be easily and inexpensively replaced, prevented the metal panel from serving its intended purpose, or created a safety hazard, the loss of that single screw is without legal significance. The conviction of damaging jail property must be reversed.

DISPOSITION

In case No. CR-47034, the conviction on count II, for attempted escape, is reversed, and the judgment regarding count IV, for conspiracy to escape, is modified to stay the 8-

month sentence. In case No. RIF-76007, the conviction for damaging jail property as a lesser offense related to that charged in count II is reversed. Except as

reversed the judgment is affirmed as modified. The trial court shall prepare and promulgate an amended abstract of judgment.

NOT TO BE PUBLISHED.

McKINSTER
J.

I concur:

RICHLI
J.

RAMIREZ, P. J.

I respectfully dissent from the majority's conclusion that there is insufficient evidence to support the conviction for damaging jail property. First, as to the majority's statement that there was no direct evidence showing that Lochmiller was the perpetrator, this is often the case, but that does not render the evidence insufficient to sustain the verdict. Certainly, there was a plethora of evidence that Lochmiller was a creative and busy man while awaiting trial and before. His removal of one security screw and loosening of the other two to the point where they could be removed by hand, which the deputy sheriff testified was periodically accomplished by other inmates without the aid of the special instrument designed to "undo" such screws, was entirely consistent with Lochmiller's previous activities. As to whether the removal of the one security screw and loosening of the other two to the point where they could be unscrewed by hand constituted destruction of jail property, the deputy sheriff who testified about these matters showed the jury a photograph of how far the panel could be opened when these three screws were no longer holding it in place. I doubt that the average homeowner, upon finding the same situation at his or her home, would not feel that he or she had been vandalized. The fact that Lochmiller removed one screw, in itself, establishes that he destroyed "any . . . property." I am unaware of any general law applicable in the criminal context that makes a crime non-existent because of the insubstantial nature of the objective of the crime. This court is aware that trial courts routinely send recidivist defendants to prison for 25 years to life for

stealing what any reasonable person under the circumstances would consider "de minimis." Why should Lochmiller be treated any differently from such defendants?

RAMIREZ
P. J.